Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term 1994

Gregorio Igartua, et al . ,
Petitioners,

v.

United States
Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether petitioners, American citizens residents of Puerto Rico, and all others similarly situated - a class of 3.5 millions American citizens, are being discriminatorily denied the right to vote in presidential elections; and such denial in conflict with respondent's domestic and international legal obligations, and in conflict with this Court's holding that federal constitutional protections of voting rights apply to the American citizens of Puerto Rico to the same extent as those of all other citizens of the United States. (*Rivera Rodríguez v. Popular Democratic Party*, 457 US 1, at 8).

II. Whether the "Uniformed and Overseas Citizens Absentee Voting Act" is unconstitutional, as it discriminates against some petitioners, American Citizens residents of Puerto Rico and all those similarly situated who previously qualified to vote in presidential elections, but lost such voting right because of moving their residence to Puerto Rico; and such discrimination upheld by the courts below, notwithstanding this Court's holding that federal constitutional protections of voting rights apply to the American citizens residents of Puerto Rico to the same extent as those of all other citizens of the United States. (*Rivera-Rodríguez v. Popular Democratic Party*, 457 US 1, at 8).

PARTIES

Petitioners are the following American citizens residents of Puerto Rico: Gregorio Igartúa , Ramón Calero, Rafael Caro, Iris González, Emilio Alfonso, Fernanda Grajales, Joseph Ronald Bevilacqua, William Sotomayor, Jorge Luis Pérez, Yvonne Pagán, Esaud Ramos, Matilde Romero.

Respondent is the United States Government.

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UNITED STATES OF AMERICA

Respondent

Petition for a Writ of Certiorari to the
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for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Gregorio Igartua, et. al., hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Add., p. 1), is reported at 32 F3d 8. The opinion of the United States District Court for Puerto Rico (Add., p. 6) which was affirmed by the First Circuit, is reported at 842 FS 607.

JURISDICTION

The judgment of the United States District Court for the Federal District of Puerto Rico was entered January 30, 1994. The decision of the United States Court of Appeals for the First Circuit affirming the ruling of the lower Court was entered on August 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL STATUTORY AND TREATY PROVISIONS

- Constitutional: U.S. Constitution, Art I, Art II, Art III, Art IV and Art VI; Amendments - 12, 13, 14, 15, 19, 20, 23, 24 and 26.

- Statutory: Uniformed and Overseas Citizens Absentee Voting Act 42 USCA 1973 ff/ff8

- Treaty: International Covenant of Civil & Political Rights, 6 ILM 368, 1967 entered into force September 8, 1992.

STATEMENT OF FACTS

A. Petitioners voting qualifications

Petitioners are all American citizens, tax payers and qualified electors, residents of Aguadilla, Puerto Rico.

Eight petitioners were born in Puerto Rico and three in a state. Petitioner Jorge Luis Pérez was born in Oriente, Cuba, completed his naturalization citizenship requirements while residing in Puerto Rico. Nine of the petitioners, including this former Cuban citizen, have qualified to vote in presidential elections while residing in a state or elsewhere in a foreign country. All petitioners' constitutional rights to vote in presidential elections are being discriminatorily denied by reason of residing in Puerto Rico, USA. This is a class action involving 3.5 million American citizens residents of Puerto Rico.

B. U.S. Policies Implemented in Puerto Rico in the Area of Civil and Political Rights (1898 to present)

1) By the Treaty of Paris, Spain ceded Puerto Rico to the United States in 1898 (Art. II - Treaty of Paris - 30 States 1754). Article IX of the Treaty specifica-

cally provided:

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."

Ever since Puerto Rico was acquired Congress has been gradually expanding the applicability of the US Constitutional framework locally "like to states".

2) Shortly after the Treaty of Paris, the Foraker Act became law. This legislation established a civil government for Puerto Rico, including provisions for courts, and it extended the statutory laws of the United States not locally inapplicable. Also, an Office in Congress of the Resident Commissioner for Puerto Rico was established. (Act. of April 12, 1990, ch. 191, 31 Stat 86 - 48 USC 891.

3) In 1917, Congress adopted the Organic Act, also known as the Jones Act, (39 Stat. 951). This legislation: accorded Federal District Court jurisdiction of all cases cognizable in the district courts of the United States; generally granted Puerto Rico citizens United States citizenship; codified a bill of rights which remain in effect until 1952 with nearly all the personal guarantees found in the United States Constitution. The provision was continued concerning the applicability of the statutory laws of the United States to Puerto Rico.

4) Congress legislated in 1940 as follows: All persons born in Puerto Rico on or after April 11, 1899, and before January 13, 1941, who were subject to the jurisdiction of the United States, who resided on January 13, 1941 in Puerto Rico or other territory over which the United States under any other statute, were citizens of the United States as of January 13, 1941.

All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, become citizens of the United States at birth. (UDCS 1402 also at 48 USCA 731 et. eq.).

5) In 1947, Congress granted the qualified voters of Puerto Rico the right to elect their own governor by popular suffrage. (Act of Aug. 5, 1947 c 490, 61 Stat. 770).

6) In 1952, Congress enacted the Puerto Rican Federal Relations Act, (64 Stat. 319, -also 48 USCA 731-916) which provided as follows:

> Within the jurisdictional territorial boundaries, the people of Puerto Rico were authorized to adopt their own constitution. Like those of the different "States" of the Union, it provided for a republican form of government, and was adopted with the consent of the People of Puerto Rico subject to the approval of the U.S. Congress, which it did subject to the condition that any amendment or revision be consistent with the applicable provisions of the Constitution of the United States. (66 Stat. 327) (*Calero v. Pearson*, 416 US 663).

The people of Puerto Rico adopted a constitution, which states in its preamble:

> "We consider determining factors in our life our citizenship of the United States of America and our aspiration continually to enrich our democratic heritage in the individual and collective enjoyment of its rights and privileges..." (P.R. Const. -1 LPRA).

In approving the Puerto Rico Constitution it was stated in Congress that "...as regards local matters, the sphere of action and the methods of government bear a

resemblance to that of any State of the Union..." (S Rep. No. 1270, 82 d Cong., 2d Sess, 6 1952). (See Art. IV - Section 4 - U.S. Const.).

"Like a State" Puerto Rico was submitted to a federalist relation with the U.S. Government, that is, bound together with the states under one national central government. Under this political organization, the Federal Government, with a republican form of government, exercises its powers over Puerto Rico, "as if Puerto Rico were a State". The political branches of the Federal Government have full powers over Puerto Rico as over the States (*Hernández Agosto v. Romero*, 594 FS 1390).

The Federal Court of Puerto Rico is included as a judicial district of the United States, and in matters of jurisdiction, powers, and procedures, it is in all respects equal to other United States district courts (See Rules of the Supreme Court of the United States - Rule 47). The Federal Courts, most particularly this Court, have treated Puerto Rico "like a state" in its decisions after the 1952 adoption of a local constitution. (*See, eg Calero Toledo v. Pearson*, 416 U.S. 663 (1974); *U.S. v. Rivera Torres*, 826 F 2d 151 (1987); *Mora v. Mejías*, 206 F 2d 377, (1953); *In re Corporation de Servicios Médicos Hospitalarios de Fajardo v. Izquierdo Mora*, 805 F 2d 440 (1986); *Trailer Marine Transport Corp. v. Rivera*, 977 F 2d 1, 1st Cir. Court, 1992); *U.S. v. Gerena*, 649 F.S. 1183 (1986). Federal Courts have also held that Puerto Rico is subject to the constitutional guarantees of due process and equal protection of the laws. Of particular importance to this petition, this Honorable Court held that voting rights of Puerto Rico citizens are constitutionality protected to the same extent as those of all other citizens of the United

States..." (*See Rivera Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982); *See eg- Examining Board v. Flores*, 426 U.S. 572 (1976); *Terry Teviol Torres v. Commonwealth of PR*, 442 U.S. 465, (1979); *Pan American Computer Corp. v. Data General Corp.*, 562 F 2d 693, 1983, *See also, Rivera Carbana v. Cruz*, 588 FS 80 (1984).

Most recently, in *Michael v. Anderson* (No. 93-5109, January 25, 1994, U.S. Court of Appeals, DC Circuit), the Court reviewed the scope of the powers to be exercised in the House by the Resident Commissioner from Puerto Rico, and upheld a House rule granting delegates from the territories and the District of Columbia the right to vote in the Committee of the whole as not a violation of Article I of the Constitution.

C Presidential Electoral Process in Puerto Rico

In 1979 the Legislature of Puerto Rico implemented Law #6 regulating Presidential Primaries in Puerto Rico. (See 16 LPRA 1323 - 1349).

Since 1979, there has been active participation in the National Parties. Participation involves: -voting in the local presidential primaries; electing state boards of directors in each national party; participating in national party hispanic assemblies; electing delegates to the national assemblies of the Republican and Democratic Parties.

D. What's at Stake in Presidential Elections for the American Citizens Residents of Puerto Rico.

Respondent, United States, as sovereign is "parents patrie", that is, guardian and trustee of its citizens, including of petitioners and all other American citizens residing in Puerto Rico. In this respect, all of the American citizens residents of Puerto Rico, as all other

American citizens owe allegiance to the Federal Government wherever these may reside.

Petitioners as American citizens residents of Puerto Rico, have an interest in voting for the President and Vice President of the United States, to the same extent as that of other U.S. citizens in the Nation, since they have the same "at stake" by the exercise of such a voting right. Within this context, it has been established by this Court in *Oregon v. Mitchell* (27 L Ed. 272, 293), "that those who have such a large stake in modern elections... whether in times of war or peace should have political equality...". In this respect, petitioners are substantially interested in voting for the President. The Executive power of the Federal Government respondent, is vested in the President of the United States. The President - is in charge of "preserving, protecting and defending the Constitution - is Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, (including Puerto Rico), when called into the actual Service of the United States, has power to grant Reprieves and Pardons for offenses against the United States - has power to make Treaties - nominates ambassadors, consuls, Judges, and all other officers of the United States - he from time to time give to the Congress information of the State of the Union, and recommends to their consideration such measures as he judges necessary and expedient (including tax policies), - he may convene both Houses - he takes care that the Laws are faithfully executed. This executive powers of the President are fully applied in Puerto Rico "as in the States of the Nation". Thus petitioners are denied the right to participate in the selection of such an important and highest elective Federal official in the Nation of which they

are citizens, and are discriminated against by a denial of a political equality required by the Courts for all who as petitioners have a large "stake" in the election of the President of the United States. (See US Const. Art. II; and *Id.*, *Oregon* case). This infringement in the right to vote of the American citizens residents of Puerto Rico must be meticulously scrutinized (*Reynolds v. Sims*, 377 US 555, at 563). The Courts below ignored this important issue alleged by petitioners.

E. The Appeals Court - AT THE LEAST - COULD HAVE GRANTED ORAL ARGUMENT AND DECLARATORY RELIEF

It is inherent in a fully operative democracy that all citizens have the right and privilege to vote in presidential elections. The President is the only elected official who represents all the voters in the Nation, and thus the outcome of the election is determined by voters **beyond the state's boundaries.** Thus, U.S. citizens right to vote in presidential elections is to be worth as much as anothers regardles of geographical location. Moreover, the right of suffrage is a fundamental matter in a free and democratic society, since exercising it in a free and unimpaired manner is preservative of other basic and political rights." (*Reynolds v. Sims*, 377 U.S. 569 - 1964). The denial to petitioner, U.S. citizens residents of Puerto Rico "- and a geographical location within the territorial boundaries and jurisdiction of the United States - to vote for the President and Vice President is discriminatory, capricious and arbitrary, contrary to domestic and international respondent's policies on democracy, on voting rights. It touches a sensitive and important area of human rights. It is against the constitutional concept of ..."We the people"... which visualizes no preferred class of voters but equality among

those who meet the basic qualification" (Id. Reynolds). Notwithstanding, the Appeals Court and the District Court ignored petitioners claim for equal treatment as American citizens, a judicial position in conflict with this courts holding in the *Rivera v. Popular Democratic Party* case, 451 US 1; and to this courts opinion in *Examining Board v. Flores*, 426 US 572, holding that in voting rights the American citizens of Puerto Rico are as constitutionally protected as all other American citizens and that they are also protected by equal protection of the law.

The voting right requested is related to an issue which Congress by legislation has provided extensively for judicial relief. (Civil Voting Right Act -42 USCA 1971 et. seq.) Moreso, most constitutional amendments are related to voting rights of citizens. In consequence, the Appeals Court, *at the least*, could have granted the declaratory relief requested by petitioners in the Complaint, even if it considered the injunctive relief innapropiate. Such declaratory relief can serve as legal basis to spark action in Congress related to the prayer of this Petition, or if failed to Act, could also provide impetus for further action. Consider within this perspective the Seventh Circuit decision in *Dickinson v. Indiana State Election Board*, 933 F 2d 497 (7th. Cir 1991).

Moreso, the Court of Appeals, as did the District Court below, disposed of petitioners complaint without benefit of oral argument, as it has been done in other cases dealing with important legal issues affecting the American citizens-residents of Puerto Rico, notwithstanding, petitioners' due process rights as held by this Court (*Examining Board v. Flores*, 426 US 572; see also, *Mora v. Mejías*, 206 F 2d 377).

See Justice Marshall's dissent in *Califano v. Torres*, 446 US at 652, which commences with a chastisement of the majority's disposition of the case, and as follows,

> ..."The Court today rushes to resolve important legal issues without full briefing or oral argument. The sole authority cited for the majority's result is another summary decision by this Court. The need for such haste is unclear..." (Cited also with approval in J.R. Torruellas, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal, (1985).

Argument Of Issues

I. THIS COURT'S HOLDING THAT THE AMERICAN CITIZENS RESIDENTS OF PUERTO RICO ARE CONSTITUTIONALLY PROTECTED IN VOTING RIGHTS AS ALL AMERICAN CITIZENS, MUST PREVAIL OVER LOWER COURTS JUDGMENT FINDING NO CONSTITUTIONAL PROTECTION FOR PETITIONERS IN THEIR REQUEST FOR VOTING RIGHTS IN PRESIDENTIAL ELECTIONS.

THIS COUR HELD THAT:

A. Federal Constitutional Protections of Voting Rights Apply with Full Force in Puerto Rico

Petitioners allege in this claim that their inability to vote in presidential elections violates their constitutional rights. The Courts below dismissed petitioners request for relief for failure to state a claim upon which relief could be granted. The Court of Appeals held that petitioners can be granted the right to vote in Presidential elections only by constitutional amendment or by a grant of statehood to Puerto Rico.

Under what rational basis can the judgment of the

Appeals Court be upheld, when it is clearly in conflict with this Court's holding that in voting rights the American citizens residents of Puerto Rico are constitutionally protected to the same extent as those of all other citizens of the United States. This Court stated in *Rivera Rodríguez v. Popular Democratic Party*, 457 US 1, 1982, that:

> ... "It is not disputed that the fundamental protections of the United States Constitution extend to the inhabitants of Puerto Rico. *See Torres v. Puerto Rico*, 442 US 465, 469-470, 61 L Ed 2d 1, 99 S Ct 2425 (1979). In particular, we have held that Puerto Rico is subject to the constitutional guarantees of due process and equal protection of the laws. *Examining Board v. Flores de Otero*, 426 US 572, 599-601, 49 L Ed 2d 65, 96 S Ct 2264 (1976); *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 US 663, 40 L Ed 2d 452, 94 S Ct 2080 (1974). We thus think that the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States..."

If the judgment below is not reversed by this Court, then there will prevail a situation of ambiguity related to the voting rights of the American citizens residents of Puerto Rico. Ambiguity will result from the holding of this Court in the *Rivera* case, which is clearly in conflict with the judgments of the Courts below holding that there is no constitutional basis to allow petitioners to vote in presidential elections. Consider, on the other hand, petitioners voting rights claim within their 15th amendment protection as confirm by this Court inthe *Rivera* case, supra.

Moreso, consider the District's Court holding against

petitioners in conflict with what the same Court had previously held in the case of *Granados v. Acevedo*, that: ..."Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections"... (703 FS 170, 1988), citing *Reynolds v. Sims*, 377 US 533, as exposed in an electoral controversy related to the San Juan mayoral election; or compare it to its applicability of the Civil Rights Act to Puerto Rico as a state. (*Rivera Carbana v. Cruz*, 588 FS 80).

Within the above context of conflicting positions by the lower courts in contradiction to those of this Court, consider of particular importance the judgment of the Appeals Court in this case, as compared with Hon. Judge Torruellas thesis in his 1985 Book - *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal*, chapter VI - Conclusion, at 268:

> "....The archaic notion.... that the United States can have a class of several million of its citizens in a subservient condition *ad infinitum*, with less rights than even aliens who reside in the United States, makes no sense and cannot today be sustained on legal, moral or logical grounds... It is the Supreme Court which should correct this grave injustice...."

It is precisely, because of the conflicting views related above to this Court, that petitioners, pursuing government by consent, have requested revision of the judgments of the Courts below.

I B. Congress can Approve Legislation Making the Elector's Systems for Presidential Elections Applicable to Puerto Rico

Without need of constitutional amendment the US

Constitution has been made applicable to Puerto Rico. The Constitution gives primary responsibility for the establishment of voting laws in Federal elections to Congress. This Court established in *Oregon v. Mitchell*, 400 U.S. 112, that... "it is the prerogative of Congress to oversee the conduct of presidential elections and to set the qualifications for voters for elections for that office."

The judgment of the Courts below suggest that the presidential voting right for petitioners can only be granted through a constitutional amendment, and that it is the states who vote through electors not citizens. Petitioners are for the proposition that, under present national judicial standards in voting rights, this cannot be so strictly interpreted. The whole process starts by the vote of citizens. It is citizens who are constitutionaly protected. An amendment is not the only basis to grant their voting right.

Consider that this Court stated in *Oregon v. Mitchell*, 400 US 112, that:

> "...The amending process is not the only way in which constitutional understanding alters with time.
>
> "...The judiciary has long been entrusted with the task of applying the Constitution in *changing circumstances*, and as conditions change the Constitution in a sense change as well..."

Consider also that in the case of Puerto Rico there are provisions of the U.S. Constitution which are limited specifically to the states, which presently apply similarly to Puerto Rico, without any constitutional amendment as if it were a state, (tacitly or by judicial interpretation - see *Trailer Marine Transport Inc. v.*

Rivera, et. al., 977 F 2d 1, 1st Cir, 1992) for example: US Constitution Article I - Sec 8; Article I - Sec. 10; Article II - Sec. 2; Article IV - Sec. 1; Article IV - Sec. 2.

It is unfounded to attempt, as respondent pretends, and as the Courts below upheld, to apply selectively on a discriminatory basis the different sections of the U.S. Constitution to the American citizens residents of Puerto Rico under present civil rights policies, of voting rights in presidential elections, when this Court has established that petitioners are protected constitutionally (*Rivera* case, supra). This is in clear conflict with the applicability of equal rights to which petitioners are also protected. Consider that this Court since the very early stages after the birth of the Nation, held that:

> "The Constitution speaks, not simply to the states in their organized capacities, but to all peoples, whether of states or territories, who are subject to the authority of the United States..." (*Martin v. Hunter*, 4 L. ed 103).

The Electors system can be made applicable to the jurisdiction of Puerto Rico under present national federal voting rights policies, so that petitioners and all similarly situated American citizens residents of Puerto Rico can vote in presidential elections.

B2. It is Applicable in D.C. a Territory

The process for electing the President and Vice President of the United States is established in Article II - Section 1 and amendment 12 of the U.S. Constitution. It was made applicable to the territory of the District of Columbia by an amendment to the U.S. Constitution (Amend XXIII). The granting of the right to vote in Presidential Elections to the American citi-

zens residents of D.C., established the precedent that U.S. citizens residents of a territory can also be granted the same right. What is the rational basis for denying the right to vote in presidential elections to the American citizens residents of Puerto Rico by not implementing the Electors' system, when these reside in a territory equally as those residing in D.C. Will this Court upheld a judgment which sustains that respondent, through an amendment to the Constitution, can establish an arbitrary, capricious and discriminatory classification of implementing the Electors' system in the territory of D.C. and deny it in Puerto Rico, which policy in essence contradicts other constitutional provisions applicable in Puerto Rico - by not equally allowing American citizens in Puerto Rico such right, (*see Rivera Carbana v. Cruz*, 588 FS 80, 1984 - equal protection of the laws applies in Puerto Rico); or will the appeals Courts and District Court prevail with a judgment whereby the discriminatory denial of voting in presidential elections in Puerto Rico is upheld in contravention to the voting rights policies protected under the Voting Rights Act applicable in Puerto Rico (*Examining Board v. Flores de Otero*, 426 US 572, 1976).

The Electors' process can be made applicable in Puerto Rico as it was to D.C. under present existing national voting rights policies, at least to the extent of sending the votes of the electors to the U.S. Senate). Under the Voting Rights Act - the language of Spanish is no barrier to participating in the electoral process. (42 USCA 1973 (b). Also, participating in the presidential electoral process is not incompatible with local electoral processess, "as in the States". (*See Galagher v. Indiana State Election Bd*, 598 NE 2d 510 (Ind 1992).

B3. U.S. Constitutional Applicability Of Elector's System By Analogy To Puerto Rico As In Other Cases

Congress has applied various constitutional provisions that referred in the Constitution only to states, or that the Constitution limits exclusively to states, to the territory of D.C. and as stated before, to Puerto Rico. By analogy, the same principle can apply to establishing the Electors process in Puerto Rico, so that the American citizens residents of Puerto Rico vote in presidential elections. For example, in the case of *Loughborough v. Blake*, 18 US 317 (1820) it was at issue whether Congress had the power to levy and collect direct taxes, duties, imposts and exercises, on D.C., a territory. The Court decided to apply the tax after comparing the process of its applicability as to a state.

Thus, plaintiffs are not requesting the applicability of something unprecedented. Following the line of reasoning of the *Loughborough* case, the Electors' process can be implemented legally to Puerto Rico. The U.S. Census operates in Puerto Rico, thus the number of electors to which Puerto Rico could be entitled can be easily established under the same procedure applied to determine those of each state or of D.C. Elections are held in Puerto Rico every four years, the same date as presidential elections are held. (See for example, *US v. Gerena*, 649 US 1183, at 1187 and *Trailer Marine v. Rivera*, 977 F 2d 1, for constitutional applicability by analogy to Puerto Rico).

C. THE DISTRICT COURT AND THE APPEALS COURT ERRED IN RELYING ON THE CASES OF "SANCHEZ" AND GUAM V. U.S.

The cases of *Sánchez v. U.S.*, 376 FS 239 (1974), and of *Attorney General of the Territory of Guam v. United States*, 738 F 2d 1017 (1984) are cited in support of the District Court and Appeals Court Judgment. As mentioned, this places petitoners request for voting rights in presidential elections as if in a "dead end street", with no further relief. Both cases are in conflict and opposition to other cases holding later that federal civil rights policies apply to the American citizens residents of Puerto Rico.

The "Sánchez" case challenged the constitutionally of Public Law 600, 48 USCA 731 (b) et. seq. On the other hand, petitioners base their claim on other legal basis, that is, on constitutional and legal grounds, some of which relate to cases decided after such case, and set forth in this Petition.

Contrary to the Appeals Court citation of such "Sánchez" case, petitioners bring to the attention of this Court the following comments stated two in such case in 1972:

> *....This court is of the opinion that it is inexcusable that there still exists a substantial number of U.S. citizens who cannot legally vote for the President and Vice President of the United States...."*
>
> (*Sánchez*, supra at 241-42).

The applicability of the Guam case to this Complaint is also incorrect if one considers that the U.S. Courts have determined that certain parts of the Constitution apply to individual insular areas, depending on each area's unique relationship with the United States. In this respect the relation of Puerto Rico and the United States should not be equalized or compared vis a vis

that of Guam. (*GAO, US Insular Areas, Applicability of Relevant Provisions of the U.S. Constitution, HRD* 9118, June 1991).

On the other hand, consider that both cases are in conflict with this Court later holding that for purposes of voting rights the American citizens of Puerto Rico are constitutionally protected to the same extent as other American citizens. (*Rivera Rodríguez v. Popular Democratic Party*, 457 US 1, 1982).

D. THE JUDGMENT OF THE APPEALS COURT IS IN CONFLICT WITH TREATY OBLIGATIONS OF RESPONDENT

Respondent is signatory to the Treaty of "International Covenant on Civil and Political Rights" (6 ILM 368, 1967, entered into force Sept. 8, 1992). It provides in pertinent part:

The States Parties to the present Covenant,

...Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings ...can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights,...

Agree upon the following articles:

Article 3

The States Parties undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 25

Every citizen shall have the right... without unreasonable restrictions:

b) To vote and to be elected at genuine periodic elections which shall be by universal and equal

suffrage and shall be held by secret ballot, guaranteeing the free expresion of the will of the electors;...

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

Treaty provisions are considered binding under the Constitution, which provides:

"ARTICLE VI

... all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding..." (See US v. Steinberg, 478 FS 29, 1979).

This Court held in the *Rivera v. Popular Democratic Party* case (456 US1), that for purposes of voting rights the American citizens residents of Puerto Rico are constitutionally protected to the same extent as those of all other American citizens. Within this context petitioners are protected to the same extent as all other American citizens by the treaty provisions previously cited, particularly their voting rights claim. Therefore this Court and its Judges are bound by the terms and conditions of the Treaty with respect to petitioners claim. The Treaty evidence the commitment and interpretation given by the highest federal officials in the matter of government by consent of the citizens, by vote of citizens. The denial of the vote in presidential elections to petitioners upheld by the Courts below, is discriminatory and unconstitutional.

Consider under what rational basis can it be interpreted, as the Courts below did, that no constitutional basis, or Treaty application can be found to justify petitioners right to vote as American citizens in presidential elections, but at the same time respondent finds legal basis to pursue democratic voting rights for citizens of other countries - e.g. - Respondent's recent interventions to restore democracy or to enforced electoral results in - Haiti, Panama, Kuwait, Granada and in other areas around the world. Moreso, consider the arrest, extradition and trial of Panama's President by respondent under treaty law interpretation. (Military personnel in these interventions include participation by American citizens residents of Puerto Rico; costs to federal treasury partially traceable to over 2 billion dollars in federal taxes paid annually from Puerto Rico. - See Igartúa, IRC 936, PR Bar Journal, 1984).

The judgment of the Court of Appeals denies petitioners protection under the Treaty on the basis that it is not self-executing and cannot give rise to privately enforceable rights, nor can it override constitutional limits the Courts interpret to deny petitioners claim.

The judgment of the Court of Appeals is in conflict with this Court decision on the Rivera case, previously cited. That the Treaty is not self executing at this period in time after respondent accepted its obligations in 1992 cannot serve as legal justification to deny the applicability of its provisions to petitioners. International human rights agreements generally require a signatory to provide such remedies (See eg., Treaty at Article 2 (3)). Failure to provide such remedies would constitute and additional violation of the agreement. (*See generally, Restatement of the Law Third - The Foreign Relations Law of the United States* - Vol. 1 &

2, American Law Institute, 1989, at Section 703, c). Also, the customary law of human rights is part of the law of the United States to be applied as such by State as well as federal Courts (Id at 702-c). The provisions of the Treaty under which petitioners claim their right to vote in Presidential elections "parallel rights that this Court has found to be constitutionally protected, eg. the right to vote, *Harper v. Virginia Bd. of Elections*, 383 US 663, 1966; *Wesberg v. Sanders*, 376 US1, 1964; *Reynolds v. Sims*, 1964, 3377 US 563, (Id at 701 Rp. Not. 8). If an international agreement or one of its provisions is non-self executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement within a reasonable time before it be deemed in default. (Treaty Article 40, within one year of the entry into force). Respondent must perform the obligations of the Treaty in good faith - *pacta sunt servanda.* This includes the implication that the obligations of the Treaty survive restrictions imposed by domestic law (Id. Restatement at Section 321, pg. 190). Moreover, under the Treaty, petitioners are exhausting national remedies and can pursue their claim in an international forum.

II. The Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973 ff to ff8 is unconstitutional, as it allows absentee voting in presidential elections by overseas American citizens, but denies this voting right to those who relocate to Puerto Rico. The Court of Appeals opinion upholding to the contrary is in conflict with this Courts previous opinions.

In 1970, the Congress of the United States enacted 42 U.S. Code annotated, section 1973 aa-1 which allowed absentee voting in Presidential elections to over

seas American citizens.

A few years later Congress enacted 42 U.S. Code 1973 ff to ff-8 and declaring in pertinent part, as follows:

"ff - (5) "overseas voter" means

(B) a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States, or

(C) a person who resides outside the United States and but for such residence would be qualified to vote in the last place in which the person was domiciled before leaving the United States.

(8) "United States", where used in the territorial sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico..."

The net effect of the above legislation is that it created a special class of voters, allowing all American citizens residing outside the United States in any foreign country in the world to continue to vote in presidential elections. On the other hand, it also established a discriminatory denial to vote in Presidential elections to those petitioners who previously qualified to vote in such elections, and all those other American citizens residents of Puerto Rico similarly situated, and who lose their voting right because of their moving residence to Puerto Rico, USA. The judgment of the District Court and of the Appeals Court held that although a citizen moving to Puerto Rico loses the right to vote in presidential elections, the American citizens in Puerto Rico can still vote for a Resident Commissioner and that such distinction neither affects a suspect class nor infringes a fundamental right. The Court also held that

this issue only warrants rational basis to pass constitutional munster, and that the Act limits state's ability to restrict such voting rights.

The judgments of the Courts below ignored all of petitioners pleadings in relation to this issue, and are in conflict with this Court's previous decisions related to the constitutional protection of voting rights of the American citizens residents of Puerto Rico.

Consider congressional intent in recognizing a class of voters - "absentee voters" in granting their right to vote in presidential elections:

> *....During the period in which Congress has gone to great lengths, including constitutional amendment, to enfranchise millions of Americans - racial minorities, the young, those in official Government service - most American citizens residing outside the United States, ...continue to be excluded from the democratic process of their own country...*
>
> *The committee recognizes the principles that the right to vote for national officers is an inherent right and privileges of national citizenship, and that Congress retains the power to protect this right and privilege under both the necessary and proper clause and the 14th amendment.*
>
> *Nevertheless American citizens outside the United States do have their own Federal stake... The President and Congress are concerned with the common interest of the entire Nation, along with the specific concerns of each State and districtt...."*

(Overseas Citizens Voting Act of 1975, Legislative History P.L. 94-203 - House Report No. 94-649 Part I, Dec. 10, 1975; see also, Uniformed and Overseas Citizens Voting Act, PL 99-410, House Report #99-

765, Aug. 7, 1986).

Notwithstanding, the Act discriminates against the American citizens who establishes residence in Puerto Rico. The Appeals Court ignored that what is at issue is a Congressional law that denies the American citizens the right to vote in presidential elections if they move residence to Puerto Rico. Regardless of states policy, the Federal Act excludes Puerto Rico from the absentee vote participation in such election. It is the federal law that provokes the discriminatory effect of disqualifying the absentee voting right of the citizen when moving to Puerto Rico. Furthermore, it ignored the fact that in the case of Puerto Rico the citizen moving from any state or D.C. to Puerto Rico loses the voting right in presidential elections contrary to the case of a resident moving from one state to another or to D.C., keeping the voting right. In addition, the Court held that the Act has a rational basis..." The Court did not explained what is the rational basis of applying an American citizen a burden of a denial of voting right in presidential elections if he moves residence to Puerto Rico.

The Appeals Court judgment on the constitutionality of the absentee vote issue is legally unfounded also for the following reasons:

a) In relation to petitioners - who had previously qualified to vote in presidential elections - the "franchise as voters was granted to them, and is taken away by Congress because of moving their residence to Puerto Rico, and in these cases lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment, or with the "Privileges and Immunities Clause". The line of discrimination or arbitrary or unreasonable classification is drawn between those American citizens that

can vote in Federal elections, from geographical areas outside of the territorial jurisdiction of the United States (absent voters in foreign countries) even if the intent of such citizens to return to the last State of residence is uncertain, and between those American citizens, as petitioners, who lost their right to vote in federal elections by moving their residence to Puerto Rico -"even though their intent to return to the last State of residence is also uncertain".

b) The exclusionary policy, which the Act provokes, requires the strictest review of this Court, for it is the fact of this exclusion that makes the classification - between voters moving into Puerto Rico who lose their right to vote, and those moving to other geographical areas outside the territorial jurisdiction of the United States (absent citizens in foreign countries) and continue with their right to vote - suspect and unconstitutional. It violates petitioners equal protection under the laws. (*Examining Board v. Flores*, 426 US 572, 599, 1976; *Rivera v. Popular Democratic Party*, 457 US 1, 1982). It also violates their rights under the Fifteenth Amendment. Moreso, the previously acquired right to vote in Federal elections of petitioners as the citizens link to his laws and government is protective of all fundamental rights and privileges (see *Wesberving v. Sanders*, 376 U.S. 1, 17 - 1964); and petitioners as American citizens of Puerto Rico are protected by the same "privileges and inmunities" of the U.S. Constitution (48 USC 737). Before this voting right can be restricted, as it does for American citizens moving to reside in Puerto Rico, in which case to right to vote in federal elections is completely lost, the purpose of the restriction (the exclusion of voters) and the

assertedly over-riding interest served by it, must meet close constitutional scrutiny (See e.g., *Evans v. Cornman*, 398 - U.S. 422; *Kramer v. Union School District*, 395 US 626).

Consider what's the compelling National interest for the denial.

c) On the other hand, respondent the United States, under the federal system endows double or leyered citizenship - of the Nation and of the State - and both protected by the Constitution. This double citizenship has been extended by Congress to absent citizens who have been granted the right to vote in presidential elections from their residence in foreign contries. There is no rational basis for discriminating against petitioners, and all other American citizens residents of Puerto Rico similarly situated, by denying them the right and privilege to vote for the President and Vice President of the United States because of their residence in Puerto Rico, when the basis of the vote is citizenship. By being deprived of this federal right to vote, they are being deprived of a democracy's most precious attribute and are penalized by this denial in their constitutional right to travel and to live where they wish. Moreso, by moving to Puerto Rico, those who previously qualified to vote in federal elections find themselves also in relation to their right to vote without part of the layered citizenship granted by the Constitution. In order to permit mobility of citizens between the various states or territories, outof-staters must continue to enjoy their rights in the new territory within the same jurisdiction of the United States. In this respect, the privileges and inmunities clause and the equal protection clause, both plicable to residents of Puerto Rico (*Id*

Examining Board v. Flores; *Rodríguez v. Popular Democratic Party*), must put new residents to Puerto Rico on equal footing with those of other states. (Consider that the constitution protects the rights of all qualified citizens to vote in state as well federal election *Reynolds v. Sims*, 379 US 870). The denial to petitioners of the right to vote in presidential elections is discriminatory and inconstitutional, it abridges -the inherent constitutional rights of citizens to enjoy their freedom of movement to and from other geographical locations in the United States. Furthermore, petitioners and all American citizens similary situated are exposed to a discriminatory situation as if there were a *tollgate for federal voting rights when moving in and out of Puerto Rico*. The tollgate of voting rights does not operates when these same citizens move to foreing countries, as established under the Voting Rights Act. The issue in relation to petitioners who previously qualified to vote in such election goes to the heart of a Congressional Act -the voting Rigths Act under the Civil Right Act of the Nation. In this respect the judgments of the Courts below are in conflict with this Courts previously cited opinions. How can the American citizens residents of Puerto Rico be protected under the constitution for purpose of voting rights and be discriminated under the Overseas Voting Act. The Courts below suggest that although an American Citizen moving residence to Puerto Rico, losses his right to vote in presidential elections, he may still vote for a Resident Commissioner. The variation of voting rights from place to place at issue in this case, is not that of not being able to vote for a Representative, a Senator, or to vote for a Resident

Commissioner, but that of losing the right to vote for the President and Vice President of the Nation by moving to Puerto Rico, and of not losing it by moving to any other part in the world. This is the issue that respondent avoided to argue and that the Courts below also ignored.

Why petitioners have to carry the burden of losing their presidential voting right by moving to Puerto Rico, and not if these move to a foreign country, as the Courts below upheld. The Absentee Vote Act, insofar as it excludes absentee voting rights in Presidential elections from Puerto Rico is unconstitutional, and the judgment of the Appeals Court should be reversed, as herein requested by petitioners. If not, a conflicting situation will prevail in relation to the constitutional protection in voting rights of petitioners as stated by this Court in the Rivera case (supra). and the opinion of the Appeals Court to the contrary in relation to the Absentee Voting Act.

CONCLUSION

For the reasons stated, the judgment below should be reversed and relief granted as herein requested.

WHEREFORE, petitioners pray this Honorable Court:

a) That the Court declare: that the denial of the right to vote in presidential elections by respondent to petitioners and to all American citizens residing in Puerto Rico similarly situated:

1) denies or abridges their inherent constitutional protections to vote on such elections;

2) has the effect of denying these citizen their right to have a President and Vice President by their consent as provided by law under the Treaty

of "Covenant of Civil and Political Rights", to which the U.S. is signatory and its provisions that all citizens are equal under the law; and that the Absentee Voting Right Act is unconstitutional as it excludes them as qualified to vote in presidential elections.

b) That this Court declare, decree, adjudge, and determine the rights of petitioners and all other American citizens residing in Puerto Rico who are qualified to vote under local state laws, to vote for the President and Vice President of the United States, and any other further equitable relief which it deems proper.

Respectfully submitted,
November, 1994.

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 94-1174

GREGORIO IGARTUA DE LA ROSA, ET. AL.,

Plaintiffs, Appellants,

v.

UNITED STATES OF AMERICA

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(Hon. Raymond L. Acosta, *U.S. District Judge*)

Before

Torruella, Cyr and Boudin,
Circuit Judges.

Gregorio Igartua on brief pro se.

Guillermo Gil, United States Attorney, *Frank W. Hunger*, Assistant United States Attorney, *Barbara C. Biddle* and *Jacob M. Lewis* Attorneys, Appellate Staff Civil Division, on brief for appellee.

August 17, 1994

Per Curiam. Appellant residents of Puerto Rico allege that their inability to vote in the United States presidential election violates their constitutional rights. Some appellants, who previously voted in presidential elections while residing elsewhere but who are now ineligible to vote in those elections, also challenge the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff *et seq.* The district court dismissed appellants' request for declaratory and injunctive relief for failure to state a claim upon which relief could be granted. We summarily affirm.

I

While appellants are citizens of the United States, the Constitution does not grant citizens the right to vote directly for the President. Instead, the Constitution provides that the President is to be chosen by electors who, in turn, are chosen by "*each state*... in such manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2 (emphasis added). Pursuant to Article II, therefore, only citizens residing in *states* can vote for electors and thereby indirectly for the President. *See Attorney General of Guam on behalf of All U.S. Citizens Residing in Guam etc.* v. *United States*, 738 F. 2d 1017, 1019 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985) ("The right to vote in presidential elections under Article II inheres not in citizens but in states; citizens vote indirectly for the President by voting for state electors."). Since Puerto Rico is concededly not a state, *see Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F 2d 1, 7 (1st Cir. 1992) (status of Puerto Rico "is still not the same as that of a State in the Federal Union"), it is not entitled under Article II to choose electors for the President, and

residents of Puerto Rico have no constitutional right to participate in that election. *See Attorney General of Guam*, 738 F. 2d at 1019 ("Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election."); *Sanchez* v. *United States*, 376 F. Supp. 239, 241 (D.P.R. 1974) (finding similar claim "plainly without merit" for purpose of convening three-judge court).

The only jurisdiction, not a state, which participates in the presidential election is the District of Columbia, which obtained that right through the twenty-third amendment to the Constitution. Such a constitutional amendment was necessary precisely "because the Constitution ha[d] restricted th[e] privilege [of voting in national elections] to citizens who reside[d] in States." H.R. Rep. No. 98, 86th Cong., 2d Sess. 2 (1960), *reprinted in* 1960 U.S. Code Cong. & Ad. News 1459, 1460. Only a similar constitutional amendment or a grant of statehood to Puerto Rico, therefore, can provide appellants the right to vote in the presidential election which they seek. *See Attorney General of Guam*, 738 F. 2d at 1019-20.[1]

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[1] Appellants' contention that their right to vote in the presidential election is secured by Article 25 of the International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967) (entered into force Sept. 8, 1992), is without merit. Even if Article 25 could be read to imply such a right, Articles 1 through 27 of the Covenant were not self-executing, see 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992), and could not therefore give rise to privately enforceable rights under United States law. *See United States v. Green*, 671 F. 2d 46, 50 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982); *United States v. Thompson*, 928 F. 2d 1060, 1066 (11th Cir.), *cert. denied*, 112 S. Ct. 270 (1991). Nor could the Covenant override the constitutional limits discussed above. *See Reid v. Covert*, 354 U.S. 1, 15-16 (1957) (plurality opinion).

II

Some appellants, who previously voted in presidential elections while residing elsewhere, also assert that their constitutional rights to due process and equal protection have been violated by the Uniformed and Overseas Citizens Absentee Voting Act [Act]. The Act provides that United States citizens, including residents of Puerto Rico, *see* 42 U.S.C. § 1973ff-6(6) & (7), who reside outside the United States retain the right to vote via absentee ballot in their last place of residence in the United States, as long as these citizens otherwise qualify to vote under laws of the jurisdiction in which they last resided. 42 U.S.C. § 1973ff-1. It does not apply, however, to citizens who move from one jurisdiction to another within the United States. *See* 42 U.S.C. § 1973ff-6(5) (defining "overseas voter" as a person "who resides outside the United States").

Appellants claim that the Act illegally discriminates against citizens who have taken up residence in Puerto Rico rather than outside the United States, because the former are not entitled by the Act to vote in their prior state of residence. In fact, however, the Act does not distinguish between those who reside overseas and those who take up residence in Puerto Rico, but between those who reside overseas and those who move anywhere within the United States. Given that such a distinction neither affects a suspect class nor infringes a fundamental right,[2] it need only have a rational basis to

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[2] Although it affects the right to vote, the Act does not infringe that right but rather limits a state's ability to restrict it. Moreover, nothing in the Act "prevent[s] any State from adopting any voting practice which is less restrictive than the practices prescribed in the Act." H.R. Rep. No. 765, 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S. Code Cong. & Ad. News 2009, 2023.

pass constitutional muster. *See FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) (equal protection); *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (due process).

Without the Act, voters who move overseas could lose their right to vote in all federal elections. However, voters who move to a new residence within the United States are eligible to vote in a federal election in their new place of residence.[3] Hence, Congress had a rational basis for seeking to protect the absentee voting rights only of the former. While the Act does not guarantee that a citizen moving to Puerto Rico will be eligible to vote in a presidential election, this limitation is not a consequence of the Act but of the constitutional requirements discussed above.

Appellants' request for oral argument is *denied*. The dismissal of appellants' claims is *affirmed*. *See* 1st Cir. Loc. R. 27.1.

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3 For example, a citizen who moves to Puerto Rico would be eligible to vote in the federal election for the Resident Commissioner. *See* Puerto Rican Federal Relations Act, 48 U.S.C. § 891 (Resident Commissioner chosen by "[t]he qualified electors of Puerto Rico"); 42 U.S.C. 1973ff-6(3) (defining "[f]ederal office" to include Resident Commissioner).

In the United States District Court

District of Puerto Rico

Civil No. 91-2506 (RLA)

IGARTUA DE LA ROSA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

JUDGMENT

This Court having granted defendant's Motion For Judgment on the Pleadings, through its Opinion and Order issued on this same date; accordingly,

It is ORDERED and ADJUDGED that this case be and the same is hereby DISMISSED with prejudice for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 20th day of January, 1994.

RAYMOND L. ACOSTA

United States District Judge

In the United States District Court
FOR THE DISTRICT OF PUERTO RICO

Civil No. 91-2506 (RLA)

IGARTUA DE LA ROSA, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA, et al.,
Defendants.

OPINION AND ORDER

This is an action filed by residents of Puerto Rico who wish to vote for the President and the Vice President of the United States. Some of the plaintiffs have always resided in Puerto Rico and have never participated in presidential elections. Others had exercised their right to vote while residing in a state of the union but have become ineligible because of their change of residence to the Commonwealth of Puerto Rico. The complaint alleges that the inability to vote in the presidential elections violates their constitutional rights and seeks declaratory and injuctive relief against the United States.

The Court has before it defendants' Motion for Judgment on the Pleadings (docket No. 12)[4] alleging, in essence, that the complaint does not state a claim upon

4 See also, Reply Brief in Support of Defendants' Motion for Judgment on the Pleadings, docket No. 31.

which relief can be granted, and also that the complaint impermissibly seeks an advisory opinion from this Court regarding the constitutionality of legislation which has not been enacted. Plaintiffs have filed their Opposition (docket No. 16), and a Supplementary Motion thereto (docket No. 24).

Upon careful consideration of the arguments advanced by the parties, this Court finds that this action should be dismissed for failure to state a claim upon which relief can be granted.

RELEVANT CONSTITUTIONAL PROVISIONS

Article II of the Constitution of the United States provides that "[e]ach state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors..." U.S. Const. Art. II § 1 (our emphasis). The electors appointed by the states, and not the voting public, are the ones who vote for, and elect, the President and Vice President of the United States. *Id.* The Constitution further provides that only states and, through the Twenty-Third Amendment, the District of Columbia, may cast electoral votes in presidential elections. U.S. Const. Art. II, § 1; amend. XXIII.

In 1974, this District Court faced a similar constitutional challenge to that now presented by plaintiffs; the same was rejected as plainly without merit. *Sanchez v. United States*, 376 F. Supp. 233, 241 (D.P.R. 1974). This Court held:

> Althoug plaintiff is a U.S. citizen, under the Constitution of the United States the President is not chosen directly by the citizens, but by the electoral colleges in the States and the District of Columbia... The whole thrust of this is that the Constitution does not by its terms, grant *citizens* the

right to vote, but leaves the matter entirely to the *States*.

Id.

A more recent challenge by residents of Guam was, likewise, rejected. "The right to vote in presidential elections under Article II inheres not in citizens but in states. " *Attorney General of the Territory of Guam v. United States*, 738 F. 2d 1017, 1019 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985). The Ninth Circuit concluded that the Constitution "does not grant to American citizens the right to elect the President." *Id.* "Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is no constitutional violation." *Id.*

Therefore, granting U.S. citizens residing in Puerto Rico the right to vote in presidential elections would require either that Puerto Rico become a state, or that a constitutional amendment, similar to the Twenty-Third Amendment, be adopted. *Territory of Guam*, 738 F. 2d at 1019; *Sanchez v. United States*, 376 F. Supp. at 242. As of this date, Puerto Rico has not become a state, neither has a constitutional amendment been adopted granting Puerto Rico the right to vote in presidential elections, as was specifically accorded to the District of Columbia.

THE POLITICAL QUESTION DOCTRINE

In order to circumvent the constitutional provisions cited above, plaintiffs contend that "Puerto Rico ['s] present political status has evolved in such a way from a Territory in 1898 to that of a 'de facto' state," and that consequently, it should be considered a state entitled to electoral votes. *See* Opposition at 2. This

argument, as defendant points out, presents a political question not suitable for judicial resolution.

The political question doctrine, which is an aspect of the Court's Article III jurisdiction, is premised upon the separation of powers among the three coordinate branches of government and the inherent limits of judicial power. *Baker v. Carr*, 369 U.S. 186, 210 (1962); *Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *United States ex rel. Joseph v. Cannon*, 642 F. 2d 1373, 1379 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982).

In *Baker v. Carr*, the Supreme Court identified six "formulations" that signal the presence of issues which are committed to the political branches:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

"Implicating any one of these factors renders a question 'political' and thus nonjusticiable." *United States v.*

Mandel, 914 F. 2d 1215, 1222 (9th Cir. 1990). A nonjusticiable case must be dismissed as not presenting a "case" or "controversy" under Article III of the Constitution. *See* 369 U.S. at 198, 217. Article III courts have a limited scope of jurisdiction, and will only decide upon matters that constitute a case or controversy. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

A complaint must set forth an actual case and controversy for judicial review. By seeking to obtain electoral votes for Puerto Rico as if it were a state, plaintiffs are requesting that this Court disregard the balance between the three coordinate branches of government, and the Article III courts' inherent limits of judicial power. *Baker v. Carr*, 369 U.S. at 210.

A determination on whether or not Puerto Rico's political status has evolved into "de facto" statehood for purposes of presidential elections would correspond to Congress. The text of the Constitution specifically commits the decision to create new states to Congress: "New States may be admitted *by the Congress* into this Union." U.S. Const. Art. IV, § 3 (our emphasis). In seeking to have Puerto Rico recognized as a "de facto state," plaintiffs seek to thrust the Court into a decision the Constitution specifically entrusts to the legislative branch of government.

Moreover, no standards exist by which a Court can or should decide what is or is not a "de facto" state. Whether Puerto Rico should be considered a "de facto" state for purposes of presidential elections is a question characterized by "a lack of judicially discoverable and manageable standards" for its resolution. *Baker v. Carr*, 369 U.S. at 217.

Any attempt by this Court to determine whether

Puerto Rico has sufficient attributes of statehood so as to be a state for purposes of Article II, § 1 would involve "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. at 217. Since the question of the political status of Puerto Rico has been the subject of debate both on the Island and in Congress, it is up to the legislative branch to make the initial policy determination regarding this matter.

Consequently, and pursuant to the political question doctrine, this Court will not enter into a matter that clearly pertains to Congress. Article III courts have historically avoided altering the balance between the three branches of government. *See Warth v. Seldin*, 422 U.S. at 498. If plaintiffs wish to obtain a determination on whether or not Puerto Rico has become a "de facto" state for the purpose of presidential elections, they should address their views and concerns to the Congress of the United States, and not to this Court.

ABSENTEE VOTING

Plaintiffs' second argument for the proposition that residents of Puerto Rico should be afforded the right to vote in presidential elections pertains to absentee balloting. In the complaint, nine of the twelve plaintiffs allege that although they previously qualified to vote in presidential elections by virtue of their residence in various states, they have lost this right upon relocating to Puerto Rico.

Plaintiffs also contend that "[f]ederal election qualification of absentee voters are clearly and unquestionably promulgated by Congress, not states, "and that federal law alone determines who may vote by absentee ballot in federal elections. *See* Opposition at 14. Plaintiffs

further argue that the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff to ff-6 ("the Act") is unconstitutional, as it allows absentee voting by overseas citizens, but not by state residents who have relocated in Puerto Rico.

While federal law places some limits on the ability of states to regulate federal elections,[5] it is primarily the states, not the federal government, that determine the manner in which presidential electors are chosen. *Anderson v. Celebrezze*, 460 U.S. 780, 794 n. 18 (1983); *Sanchez*, 376 F. Supp. at 241.

The Act, 42 U.S.C. §§ 1973ff to ff-6, grants U.S. citizens living abroad the right to vote in federal elections, as though they were present in their last place of residence in the United States. The Act specifically applies to residents of the fifty states -- and to residents of Puerto Rico, Guam, the Virgin Islands and American Samoa -- who live overseas. 42 U.S.C. §§ 1973ff-1, ff-6 (6).

The Act does not establish the sole criteria for absentee voting, but rather leaves states free to allow additional classes of people to vote by absentee ballot. Similarly, the Act recognizes that states may impose additional requirements on absentee voters as long as these are not inconsistent with federal law. The Act does not prevent persons who have become qualified to vote in a particular state from continuing to vote in that state by absentee ballot during a period of residence elsewhere in the United States.

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5 For instance, the Voting Rights Amendments of 1970, 42 U.S.C. § 1973aa-1 (1988), limits the ability of states to impose durational residency requirements on individual voting in presidential elections, yet leaves other matters to the discretion of the states. *See Oregon v. Mitchell*, 400 U.S. 112 (1970).

As defendant properly brings to our attention, plaintiffs have not cited any provision of federal law which prohibits them from voting by absentee ballot. Furthermore, plaintiffs have apparently not contacted the states where they resided prior to relocating to Puerto Rico to inquire about the absentee ballot provisions at those states. Were they to be denied the right to vote, they could seek relief from those states. It would be up to the states in question to determine whether plaintiffs are qualified voters for the purpose of absentee balloting.

Therefore, and contrary to plaintiffs' assertions, neither the Voting Rights Amendments nor the Uniformed and Overseas Citizens Absentee Voting Act impair the ability of plaintiffs to continue voting for President and Vice President. The issue of whether they are qualified voters would be one to be determined by the states where they previously resided. As this would not be a matter under federal law, plaintiffs' contention fails to state a claim against the United States upon which relief can be granted.

DUE PROCESS AND EQUAL PROTECTION CLAUSES

As part of the absentee voting issue, plaintiffs also allege that the Uniformed and Overseas Citizens Absentee Voting Act is unconstitutional, since it violates the Due Process Clause and the Equal Protection component of the Fifth Amendment. Plaintiffs argue that the Act discriminates against U.S. citizens by denying those who previously voted in presidential elections the right to absentee voting. *See* Opposition at 25.

This Court must only entertain unavoidable constitutional questions. *Commonwealth v. Secretary of Health and Human Services*, 899 F. 2d 53, 55 (1st Cir. 1990). If there are suitable alternative grounds, courts have the

duty to avoid the constitutional issues. *Benoni v. Boston and Maine Corp.*, 828 F. 2d 52 (1st Cir. 1987). Although we have found that the complaint fails to bring a proper case and controversy before the Court, we will, nonetheless, briefly address plaintiffs' constitutional challenge.

Under the Due Process Clause, if a statute has a "reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory, the requirements of due process are satisfied..." *Nebbia v. New York*, 291 U.S. 502, 537 (1934). Likewise, under the Equal Protection Clause, a statute not directed at a suspect or quasi-suspect class must be upheld if it has a rational basis. *Clements v Fashing*, 457 U.S. 957, 967 (1982) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 177, 179 (1980); *Matthews v. DeCastro*, 429 U.S. 181, 185 (1976). Since the distinction drawn in the Act, between U.S. citizens living abroad and U.S. citizens living within the United States, does not implicate any suspect or semi-suspect class of people, it is evaluated under the "rational basis" test for Equal Protection purposes.

The Act has a legitimate governmental purpose, namely "to facilitate absentee voting by United States citizens, both military and civilian, who are overseas." H.R. Rep. No. 99-765, 1986 U.S.C.C.A.N. at 2009. It should be emphasized that the Act does not grant all overseas state residents the right to vote in presidential elections. Instead, it grants U.S. citizens living abroad the right to vote in federal elections -- whether for president or other federal offices -- as though they were present in their last place residence in the United States.

That the Act is limited to American citizens who are absent from the country, rather than Americans who move from place to place within the United States, is rational and nondiscriminatory. Americans who move within the United States lose their voting rights in their old residence while gaining voting rights in their new residence, whereas Americans who move overseas do not acquire new voting rights in the country to which they move. The Act simply ensures that such overseas citizens can continue voting in federal elections from their last place of residence as though they were still there.

When a resident of New York moves abroad, he or she will not gain voting rights at the new country. The Act would allow such a voter to retain his or her New York voting rights. If this same resident of New York relocated to Puerto Rico, he or she would no longer participate in New York federal elections, but would gain voting rights in Puerto Rico -- and vote in federal elections for the Resident Commissioner. Although plaintiffs consider this change of voting rights as highly unfavorable, *see* Opposition at 12-13, this Court finds that such changes in voting rights are part of the benefits and burdens of moving to another jurisdiction.

Therefore, the Act has a reasonable relation to a proper legislative purpose, is neither arbitrary nor discriminatory, and has a rational basis. The Act is not unconstitutional, and plaintiffs have failed to state a claim on which relief can be granted.

In view of the above, and after careful consideration of the arguments advanced by the parties in their pleadings and motions, the Court hereby GRANTS Defendant's Motion for Judgment on the Pleadings, and con-

sequently, hereby DISMISSES the instant action with prejudice, for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 20th day of January, 1994.

RAYMOND L. ACOSTA
United States District Judge

(2)

Supreme Court, U.S.
FILED
MAR 14 1995
OFFICE OF THE CLERK

No. 94-878

In the Supreme Court of the United States

OCTOBER TERM, 1994

GREGORIO IGARTUA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether United States citizens residing in the Commonwealth of Puerto Rico are constitutionally entitled to vote for electors for President and Vice President of the United States.

2. Whether the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973ff *et seq.*, is unconstitutional for failing to provide that American citizens who move to Puerto Rico retain the federal voting rights they possessed in their prior State of residence.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 32 F.3d 8. The opinion of the district court (Pet. App. 7-17) is reported at 842 F. Supp. 607.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1994. The petition for a writ of certiorari was filed on November 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, twelve United States citizens residing in Puerto Rico, filed suit in the United States District Court for the District of Puerto Rico, alleging that their

inability to vote for President and Vice President of the United States violated their constitutional rights. Petitioners also challenged the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973ff to 1973ff-6 (Overseas Voting Act), because the Act provides for absentee voting in presidential elections for United States citizens who move overseas, but not for those who move from one of the fifty States to Puerto Rico. Petitioners sought declaratory and injunctive relief.

The district court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. Pet. App. 8. The court found that Article II of the United States Constitution expressly provides that the "States," not individual citizens, may choose electors for President and Vice President. *Ibid.* Because Puerto Rico is neither a State nor the subject of a constitutional amendment like the Twenty-Third, which extended voting rights in presidential elections to the District of Columbia, the court held that U.S. citizens residing in Puerto Rico have no right to vote in presidential elections. Pet. App. 9.

The district court rejected petitioners' contention that Puerto Rico has attained the status of a "de facto" State entitled to electoral votes. Pet. App. 9-12. The court concluded that Article IV of the Constitution specifically commits to Congress the decision to create new States, and concluded further that no judicially manageable standards exist for determining whether Puerto Rico should be considered a "de facto" State for purposes of voting in presidential elections. Pet. App. 11-12. Accordingly, the district court held that the issue presented a nonjusticiable political question. *Id.* at 12.

Finally, the district court held that the Overseas Voting Act does not unconstitutionally discriminate

between state residents who move overseas and those who move to Puerto Rico. Pet. App. 14-16. The Act permits persons living abroad to vote by absentee ballot in their last place of residence in the United States (including Puerto Rico) so long as they had been qualified to vote in that place immediately before moving abroad. See *id.* at 13. The Act, however, does not apply to persons who move to Puerto Rico or other U.S. territories. The court found that the Act's distinction between persons moving abroad and those moving within the United States was "rational and nondiscriminatory," since individuals who move to a new place within the United States gain voting rights in their new residence, while individuals who move abroad do not acquire federal voting rights in the country to which they move. *Id.* at 16. Because it found that the Act bears a reasonable relation to a proper legislative purpose, the court rejected petitioners' due process and equal protection claims. *Ibid.*

2. The court of appeals affirmed in a per curiam opinion. Pet. App. 1-5. The court held that, under Article II, the right to vote for presidential electors inheres in States rather than in individual citizens. Pet. App. 2. Since Puerto Rico is not a State, and since no constitutional amendment accords Puerto Rico presidential voting rights like those given the District of Columbia by the Twenty-Third Amendment, the court found no basis for petitioners' constitutional claims. Pet. App. 2-3.

The court of appeals also rejected petitioners' challenge to the Overseas Voting Act. Pet. App. 4-5. The court found that the Act's distinction between citizens who move overseas and those who move within the United States neither imposes a suspect classification nor infringes a fundamental right, and therefore

need only be justified by a rational legislative basis. *Ibid.* That rational basis was established by Congress's limited goal of protecting the federal voting rights of persons who move abroad and gain no new federal voting rights in their overseas residence. *Id.* at 5. The court concluded that the effect of a move to Puerto Rico upon an individual's ability to vote in presidential elections is a consequence of the Constitution rather than of the Overseas Voting Act. *Ibid.*

The court of appeals also rejected, in a footnote, the argument raised for the first time on appeal that petitioners are guaranteed presidential voting rights by a provision of the International Covenant on Civil and Political Rights, entered into force Sept. 8, 1992, art. 25, 6 I.L.M. 375 (1967), a multilateral treaty to which the United States is a signatory. Pet. App. 3 n.1. The court found that, even if the Covenant provision could be read to imply such a right, the treaty could not give rise to privately enforceable rights in the United States because the provision is not self-executing, and because, in any case, the terms of the Covenant cannot override the constitutional limits of Article II. Pet. App. 3 n.1.

ARGUMENT

1. a. United States citizens residing in Puerto Rico have no constitutional right to vote in presidential elections because the Constitution assigns to the "States"—and by express constitutional amendment, to the District of Columbia—the right to choose electors for President and Vice President. Article II provides that "[e]ach *State* shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the *State* may be entitled in the Congress." U.S. Const. Art. II, § 1, Cl. 2 (emphasis

added). Similarly, the Twelfth Amendment provides that the electors "shall meet in their respective *states* and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same *state* with themselves." U.S. Const. Amend. XII (emphasis added).

The import of these constitutional provisions is clear: Jurisdictions that are part of the United States but are not "States" and do not send Senators and Representatives to Congress, are not empowered to choose electors for President and Vice President.[1] See *Anderson* v. *Celebrezze*, 460 U.S. 780, 794 n.18 (1983) ("the Constitution expressly delegates authority to the *States* to regulate the selection of Presidential electors") (emphasis added); *Buckley* v. *Valeo*, 424 U.S. 1, 106 (1976) (per curiam) ("a President is elected not by popular vote, but by winning the popular vote in enough *States* to have a majority in the Electoral College) (emphasis added).

Accordingly, a constitutional amendment was required to authorize citizens of the District of Columbia to choose electors for President and Vice President. U.S. Const. Amend. XXIII (District shall appoint "[a] number of electors * * * equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State"). As Congress recognized at the time of its passage, such an amendment was necessary because "the Constitution provides

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[1] By Act of Congress, Puerto Rico is entitled to send a Resident Commissioner to the House of Representatives. Act of Apr. 12, 1900, ch. 191, § 39, 31 Stat. 86. The voting rights of the Resident Commissioner are prescribed by rules of the House of Representatives, subject to constitutional limitations. See generally *Michel* v. *Anderson*, 14 F.3d 623 (D.C. Cir. 1994).

machinery only through the *States* for the selection of the President and the Vice President (art. II, sec. 1)." H.R. Rep. No. 1698, 86th Cong., 2d Sess. 2 (1960) (emphasis added); see also *ibid.* (D.C. residents "cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States").

The First Circuit's decision in this case comports with the views of the only other circuit to address a similar claim. In *Attorney General of Guam* v. *United States*, 738 F.2d 1017 (1984), cert. denied, 469 U.S. 1209 (1985), the Ninth Circuit rejected a suit seeking presidential voting rights brought on behalf of U.S. citizens residing in Guam. That court explained: "[t]he right to vote in presidential elections under Article II inheres not in citizens but in states: citizens vote indirectly for the President by voting for state electors. Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is no constitutional violation." 738 F.2d at 1019. See also *Sanchez* v. *United States*, 376 F. Supp. 239, 241 (D.P.R. 1974) (finding identical claim by Puerto Rican residents "plainly without merit" for purposes of convening three-judge court).

Similarly, whatever its powers of local self-government, "the status of the Commonwealth of Puerto Rico is still not the same as that of a State in the Federal Union." *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1, 7 (1st Cir. 1992) (quoting Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 19 (1953)). Cf. *Harris* v. *Rosario*, 446 U.S. 651, 651-652 (1980) (per curiam) ("Congress * * * may treat Puerto Rico differently from States so long as there is a rational basis for its actions."); *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 596

(1976) (Puerto Rico occupies a unique relationship to the United States). Because Puerto Rico is not a State, U.S. citizens residing in Puerto Rico have no constitutional right to vote in presidential elections.[2] The fact that Puerto Rico may be "like a state" (see Pet. 5) in various respects does not confer rights explicitly withheld by the Constitution.

b. The court of appeals correctly rejected petitioners' argument, raised for the first time on appeal, that their inability to vote in presidential elections violates Article 25 of the International Covenant on Civil and Political Rights (Covenant), a multilateral treaty to which the United States is a party. See 6 I.L.M. 375 (entered into force Sept. 8, 1992). In its resolution of ratification, the Senate "declare[d] that the provisions of Articles 1 through 27 of the Covenant are not self-executing," 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992),[3] a fact peti-

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[2] Petitioners rely heavily on this Court's statement in *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 8 (1982), that "the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States." See, *e.g.*, Pet. 11, 18, 19. The quoted language, however, refers to the rights of *individual citizens*, while the Constitution reserves to the *States*, not to citizens, the right to vote for President by presidential electors. See U.S. Const. Art. II, § 1, Cl. 2; *Buckley* v. *Valeo*, 424 U.S. at 106. Petitioners also rely (*e.g.*, Pet. 9, 11) on *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 600 (1976), which recognized that due process and equal protection guarantees extend to residents of Puerto Rico. The protections in the Fifth Amendment, however, do not invalidate the express terms of Article II.

[3] In doing so, the Senate adopted a proposal made by the President. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 19 (1992); see also Restatement (Third) of Foreign Relations of the United States § 111, cmt. h (1987) ("the intention of the United States determines whether an agreement is to be self-executing in

tioners apparently concede (Pet. 20). The Covenant therefore does not give rise to privately enforceable rights under U.S. domestic law. See *United States* v. *Thompson*, 928 F.2d 1060, 1066 (11th Cir.) ("a treaty must be self-executing in order for an individual citizen to have standing to protest [its] violation"), cert. denied, 502 U.S. 897 (1991); see also *United States* v. *Green*, 671 F.2d 46, 50 (1st Cir.), cert. denied, 457 U.S. 1135 (1982); Restatement (Third) of Foreign Relations of the United States § 111, cmt. h (1987).[4]

Moreover, even were the treaty self-executing, the Covenant could not override specific limitations contained in the Constitution. See, *e.g.*, *Reid* v. *Covert*, 354 U.S. 1, 16-17 (1957) (plurality opinion). In addition, the Senate expressly conditioned its ratification of the Covenant on the proviso that "[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992).

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the United States or should await implementation by legislation or appropriate executive or administrative action. * * * [O]ften the President must decide in the first instance whether the agreement is self-executing.").

[4] Article 25 of the Covenant provides, in pertinent part:

> [e]very citizen shall have the right and the opportunity, without * * * unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) To vote * * * at genuine periodic elections which shall be by universal and equal suffrage * * *, guaranteeing the free expression of the will of the electors.

6 I.L.M. at 375. It is not clear that there is any conflict between these general provisions and the inability of Puerto Ricans to vote for electors for President.

2. Several of the petitioners moved to Puerto Rico from a State. These petitioners argue that the Overseas Voting Act unconstitutionally discriminates against them because it authorizes absentee voting in presidential elections by residents of States who move to foreign countries, but not by those who move to Puerto Rico. Pet. 21-28.

The Overseas Voting Act provides that U.S. citizens residing outside the United States who are otherwise qualified to vote in their last State of residence, or who were so qualified at the time they left that State, may cast absentee ballots in federal elections in that State. 42 U.S.C. 1973ff-1, 1973ff-5. The Overseas Voting Act does not apply, however, to people who move from one place to another within the United States, including those who move from a State to Puerto Rico. 42 U.S.C. 1973ff-6(5), 1973ff-6(8) (defining "overseas voter" to mean a person "who resides outside the United States," and defining "United States" to include Puerto Rico).

The court of appeals concluded that the Act does not violate equal protection or due process principles. It held that the distinction drawn in the Act between U.S. citizens who move overseas and those who move to another part of the United States "neither affects a suspect class nor infringes a fundamental right" (Pet. App. 4); thus, the classification need only bear a rational relationship to a legitimate governmental objective. See, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) (equal protection); *Reno* v. *Flores*, 113 S. Ct. 1439, 1448-1449 (1993) (substantive due process).

Petitioners contend that Congress's extension of absentee voting rights did not reach far enough, and that petitioners who have moved to Puerto Rico from a State should, like "overseas" voters, be authorized to file state absentee ballots in presidential elections. Pet. 24-28.

This Court has held that claims of that nature are subject to rational basis review. In *Katzenbach* v. *Morgan*, 384 U.S. 641, 656-658 (1966), the Court considered a challenge to the constitutionality of Section 4(e) of the Voting Rights Act, 42 U.S.C. 1973b. Section 4(e) barred States from applying English literacy requirements to voters who had been educated through the sixth grade in American-flag schools in which the predominant classroom language was other than English. See 384 U.S. at 643 n.1. The *Katzenbach* petitioners argued that Section 4(e) discriminated against voters educated in a language other than English in *non*-American-flag schools, *i.e.*, "that Congress violated the Constitution by not extending the relief effected in § 4(e) to those educated" outside U.S. territory. 384 U.S. at 656-657. This Court held that

> [i]n deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights * * * is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principle[] that a "statute is not invalid under the Constitution because it might have gone farther than it did."

Id. at 657. The Court, finding various legitimate grounds that "might well have been the basis for the decision of Congress to go 'no farther than it did,'" sustained Section 4(e) against petitioners' equal protection

challenge. 384 U.S. at 658.[5] See also *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 471 n.33 (1977) ("mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment").

The rationale of *Katzenbach* applies in this case, and the Overseas Voting Act satisfies rational basis review. In enacting the Act (and its predecessor legislation), Congress sought to extend and protect absentee voting rights in federal elections.[6] See H.R. Rep. No. 765, 99th Cong., 2d Sess. 5 (1986) ("The primary purpose of [the Overseas Voting Act] is to facilitate absentee voting by United States citizens, both military and civilian, who are overseas."); *id.* at 6 (absentee ballots may be used "by overseas voters who would otherwise be disenfranchised"). The Act does not restrict or deny voting

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[5] See also *Buckley* v. *Valeo*, 424 U.S. at 105 (federal campaign-finance law not unconstitutional for failing to provide funds for candidates not running in party primaries; Congress may choose "to limit * * * the reach of the reforms"); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 37-39 (1973) (applying rational basis review and upholding Texas school-financing scheme alleged to discriminate against students from poorer neighborhoods, where entire scheme was aimed at extending and improving public education).

[6] The substantive provisions of the Overseas Voting Act that are challenged in this case were originally enacted as part of the Overseas Citizens Voting Rights Act of 1975 (1975 Act), Pub. L. No. 94-203, 89 Stat. 1142, codified at 42 U.S.C. 1973dd to 1973dd-6. The current legislation made only minor substantive changes in preexisting law, and was intended primarily to consolidate and update the provisions of the 1975 Act and a second statute—the Federal Voting Assistance Act of 1955—that also dealt with absentee voting. H.R. Rep. No. 765, 99th Cong., 2d Sess. 6 (1986). Accordingly, much of the relevant legislative history is found in the history of the 1975 Act.

rights to any class of persons; it is, rather, "a reform measure aimed at eliminating an existing barrier to the exercise of the franchise," *Katzenbach*, 384 U.S. at 657, by providing for absentee voting in enumerated circumstances.

Congress was concerned that "most American citizens residing outside the United States, who are in the private sector, continue to be *excluded* from the democratic process of their own country." S. Rep. No. 120, 94th Cong., 1st Sess. 4 (1975) (emphasis added); H.R. Rep. No. 649, 94th Cong., 1st Sess. 4 (1975) (emphasis added).[7] In extending absentee voting protections, it was rational for Congress to distinguish between U.S. citizens who move to a different jurisdiction within the United States, and thereby acquire new federal voting rights and avenues for participation in the federal political process, and citizens who move overseas, and thereby acquire no new United States voting rights or means of participating in U.S. national politics.[8] In

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[7] Congress found in 1975 that only about 25% of the more than 750,000 voting-age private citizens living abroad cast a ballot in the 1972 general election. S. Rep. No. 121, 94th Cong., 1st Sess. 2, 6 (1975); H.R. Rep. No. 649, 94th Cong., 1st Sess. 2, 6 (1975). Because these persons were "subject to U.S. tax laws and other obligations of American citizenship," Congress believed that the restrictive absentee voting requirements of many States unfairly discriminated against those citizens. S. Rep. No. 121, *supra*, at 2, 3; H.R. Rep. No. 649, *supra*, at 2, 3.

[8] It is not uncommon for federal legislation to distinguish, explicitly or implicitly, between acts and events that occur within the United States and those that occur in foreign territory. See, *e.g.*, 28 U.S.C. 2680(k) (Federal Tort Claims Act's waiver of sovereign immunity does not apply to "[a]ny claim arising in a foreign country"). Indeed, this Court has long applied a "canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the

contrast to the state resident who moves to a foreign country, the state resident who moves to Puerto Rico gains the right, *inter alia*, to vote for a federal officer (Puerto Rico's Resident Commissioner to Congress) and to participate in the presidential nominating process. See U.S. General Accounting Office, *U.S. Insular Areas: Applicability of Relevant Provisions of the U.S. Constitution* 7 (1991).

Moreover, if Congress had extended absentee voting rights to citizens who relocate to Puerto Rico, some Puerto Rican residents would be able to vote in presidential elections while their otherwise similarly-situated Puerto Rican neighbors could not. In contrast, Congress's grant of absentee voting rights to overseas citizens does not create any disuniformity of rights within that class of persons.[9] Congress could reasonably have concluded that extending federal absentee voting rights to persons who move to Puerto Rico—and thereby

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territorial jurisdiction of the United States." *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949) (holding that eight-hour labor law applies only to contracts performed within United States territory); *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (applying canon to Title VII of 1964 Civil Rights Act). In this case, Congress had particular reasons to be concerned with the rights of citizens who move outside the United States and, therefore, to create a classification that applies *only* extra-territorially.

[9] To the contrary, Congress's initial extension of absentee voting rights to overseas citizens in the 1975 Act sought to remedy what it perceived to be state "discrimination in favor of [overseas] Government personnel and against [overseas] private citizens." S. Rep. No. 121, *supra*, at 3; H.R. Rep. No. 649, *supra*, at 3. That is, Congress had found that most States permitted military personnel and other federal employees living overseas to cast absentee ballots, while private citizens often could not. S. Rep. No. 121, *supra*, at 3; H.R. Rep. No. 649, *supra*, at 3.

become subject, like other Puerto Rican residents, to the benefits and burdens of such residence—would not only create a questionable end-run around the strictures of the Constitution, but would work a discrimination against native-born Puerto Ricans.

It also is important to recognize that "[n]othing in th[e] Act" "prevent[s] any State from adopting any voting practice which is less restrictive than the practices prescribed by th[e] Act." H.R. Rep. No. 765, *supra*, at 19. Although Congress has chosen to expand the absentee voting rights of only one class of persons, the States remain free to extend such rights to other classes, including petitioners.

In assuring absentee voting rights only to citizens who move overseas, Congress chose to provide a limited remedy to a problem of disenfranchisement. Under settled principles of this Court's jurisprudence, "the limitation of relief effected in [the Overseas Voting Act] does not constitute a forbidden discrimination" because rational and legitimate factors support the "decision of Congress to go 'no farther than it did.'" *Katzenbach*, 384 U.S. at 658.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94 - 878

In The
Supreme Court of the United States
October Term 1994

Gregorio Igartua, et al.,
Petitioners,

v.

United States
Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. - 878

GREGORIO IGARTUA, et. al.

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITIONER'S REPLY BRIEF

This Petition presents the peculiarity that the Attorney General of the United States, contrary to the dispositions of 42 USCA 1971-c is intervening on behalf of a discriminatory denial of voting rights to the class represented by petitioners (3.5 million American citizens).

I. THE COURT SHOULD RESOLVE THE QUESTION WHETHER RESPONDENT CAN CONTINUE TO DENY PETITIONERS THE RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS ON GROUNDS THAT ONLY CITIZENS FROM STATES CAN VOTE FOR ELECTORS.

Clause IV, Section 4 of the U.S. Constitution requires that the United States shall guarantee to every state in this Union a "Republican Form of Government". Within this context, Congress legistated to this effect for Puerto Rico, and the People of Puerto Rico adopted a constitution in 1952, as shown below:

-64 Stat 319. 8,1st Cong., 2D SESS, -CHS, 446.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, **fully recognizing the principle o government by consent**, this Act is now adopted so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption. The **said constitution shall provide a republican form of government** and shall include a bill of rights.

-66 Stat. 327, Public Law 447-July 3, 1952.

"Resolved... that the constitution of Puerto Rico... **is hereby approved by the Congress of the United States.**

-Puerto Rico Constitution - Preamble

We, the people of Puerto Rico, in order **to be politically organized under democratic principles,** promote the general welfare and guarantee for us and our posterity the **full enjoyment of human rights**, with confidence in God Almighty, do order and establish this Constitution for the Free Associated State which in the exercise of our natural right **we create within our union with the United States of America.**

Doing so we declare:

"...That **we consider as determinant factors in our lives the American citizenship of the United States of America and the aspiration to continually enrich our democratic values in the individual and collective enjoyment of its rights and prerrogatives; the loyalty to the postulates of the Federal Constitution...**

These actions by respondent in 1950 & 1952 and by the People of Puerto Rico can only be morally and se-

riously interpreted as having being exercised legally and in good faith, and the democratic goals adopted must not be considered so that eventual results would be futile. But 45 years later respondent proposes to ignore them on grounds that it is not a state.

The distinction whether Puerto Rico is a territory; or whether it is unincorporated or not, has been considered not pertinent or determinative for some purposes; e.g., for nationality purposes since the conferral of american citizenship to persons born in Puerto Rico since 1940, (Restatement of the Law, Third, Amer. Inst., Foreign Relations Law of the U.S., Reporters' notes, pg. 121.). (But see *Romero v. U.S.*, 1994 WL 570581 (1st Cir. Oct. 19, 1994); *U.S. v. Sánchez* - 992 F 2d 1143. (11th. Cir.); *United States v. López Andino*, 83 F.2d 1164 (1st Cir. 1987)).

In *Trailer Marine Transport Corp v. Rivera*, 977 F2d 1 (1st Cir. 1992), the Court held a constitutional provision applicable as follows:

> "Today, the government of the Commonwealth of Puerto Rico in many respects resembles that of a state... Citizens of Puerto Rico, like citizens of the states, are citizens of the United States. 8 U.S.C. Sec. 1402. The United States guarantees Puerto Rico a republican form of government and Puerto Rico is bound to respect the rights, privileges and immunities of all citizens. 48 U.S.C. Sec. 731, 737. Compare U.S. Const. art. IV, Sec. 4; amend. XIV, Sec. 1...
>
> "...Against this background, we conclude that Puerto Rico is subject to the constraints of the dormant Commerce Clause doctrine **in the same fashion as the states.**"... (See document #40 of

Docket file in Appeal's Court).

Thus the Court below interpreted as applicable a constitutional provision within the context that full economic integration is as important to Puerto Rico as to any state in the Union and because Puerto Rico cannot erect an intermediate boundary separating it from the rest of the country, since it is not an "alter ego" of the federal government. But the same court rejected applying same principle to petitioners' claim of voting rights in Presidential elections, as a **"voting rights in Presidential elections integration"** principle.

Petitioners are in a position like in a dead end street considering the contradictory opinions of the courts and of the arguments by respondent. Moreso, if it is considered that the American citizens residents of Puerto Rico have a constitutional right to remain as U.S. citizens unless they voluntarily relinquish that citizenship, (*Afroyim v. Rusk*, 387 US 253), but even have not been allowed to renounce it to remain as nationals of this country. (*Santori v. U.S.*, 30 F3d 126).

On the other hand, the electors system is applicable to Puerto Rico as in essence it was a plan by the constitutional convention, devised to render the process untainted and free from impurities to afford a moral certainty that the office of President would seldom fall to any man not endowed with the requisite qualifications, and providing for direct vote for electors by the citizens (The Federalist Papers, Hamilton, Madison & Jay, 1961)

Clause IV Section 2 of the U.S. Constitution establishes that the citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States, and it was expressly made applicable by Congress to Puerto Rico. (48 U.S.C. 737, 1988). In rela-

tion to voting rights, section 1 of the U.S. Constitution, Amendment 15, establishes that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude". Petitioners are protected by this provision since this Court held that the local voting rights of Puerto Rican citizens are constitutionally protected to the same extent as those of all other U.S. citizens. *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 7-8 (1982). Thus, respondent's discriminatory denial to petitioners and the opinions of the courts below are in conflict with such court's holding, and this contradiction justifies that the petition be granted to clarify it.

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), this Court upheld the constitutionality of the Voting Rights Act and confirmed Congress' broad authority to make or alter laws regulating national elections... Within this authority, Congress adopted in January 3, 1995 the National Voter Registration Act 42 USCA 1973gg-1 providing that:

> (1) the right of citizens of the United States to vote is a fundamental right;
>
> (2) it is the duty of the Federal Government to promote the exercise of that right; ...(42 USCA 1977gg-a1 & 2).

Under prevailing legal and judicial precedents such legislation is also applicable to the American citizens residents of Puerto Rico and justifies legally further why the Petition should be granted.

II. THE COURT SHOULD RESOLVE THE QUESTION WHETHER RESPONDENT CAN DENY PETITIONERS THE RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS ON GROUNDS THAT THE TREATY IS NOT SELF-EXECUTING.

Respondent argued that petitioners raised for the first time on appeal that their inability to vote in presidential elections violates Article 25 of the Treaty of International Covenant on Civil and Political Rights (99 U.N.T.S. 171), and which entered into force Sept. 8, 1992, after claim was submitted in District Court. Notwithstanding, any doubts on why issue was raised on appeal should be resolved in favor of petitioners, since issue is a legal one of continuing importance for this class action. (*Trailer Marine Transport Corp.* Case, infra).

It is pertinent to inform this Court of the following acts by respondent after Petitioners Brief was submitted.

> December 9-11 1994 Respondent was a signatory to the SUMMIT OF THE AMERICAS DECLARATION OF PRINCIPLES, which established that:
>
> ...We reaffirm our commitment to preserve and **strengthen our democratic systems** for the benefit of **all people** of the Hemisphere. (Miami, Florida). (Compare with answer 22 of complaint).
>
> December 14, 1995 - The White House, December 14, 1994, "Statement by the Press Secretary" - The Administration announced today a program to assist the revitalization of the Haitian economy. The package of measures reflects President Clinton's conviction that creating productive employment for Haitians is the key to self-sustaining economic recovery and **strenghtening** Haiti's restored democracy.

Respondent's acts shows its commitments to democracy abroad and also that it interprets its international obligations in such a way so that practical democracy for foreign policy purposes be far in advance than democracy within its jurisdictional boundaries.

On the other hand, respondent's interpretation of its treaty obligations are contradictory in this case. Respondent pretends that the treaty of Covenant of Political Rights is not self-executing (opp. B at 8), to justify that "it does not give rise to privately enforceable rights", as those voting rights claim in this action. The net result of this interpretation is that the human and civil rights the treaty attempts to guarantee and protect in sections 1-27 are not applicable within the U.S. jurisdiction, but that the only sections applicable are 28-53 which deals with the administration of the treaty, recognizing it out but not in.

Under international law practice a treaty is generally binding on states parties from the time it comes into force for them, whether or not it is self-executing for a state party, that state is obliged to implement it promptly, and failure to do so would render it in default on its treaty obligations. (Ch. 2, Restatement of the Law, Third, Amer. Inst., Foreign Relations Law of the U.S., pg. 55). Moreso, consider the disposition of Article 40 of the Treaty, which respondent accepts to be self-executing, and which requires the signatory country to submit reports on the measures adopted to give effect to the rights recognized in the treaty. Will respondent inform about this claim to meet its obligation under the treaty? Within this context consider that Article 3 of the treaty requires the United States to "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in it. (See also obligations under Art. 2).

Respondent proposes that the treaty cannot override specific limitations contained in the Constitution (opp. B at 8). Notwithstanding the treaty requires in Article 5 that the signatory country cannot restrict the funda-

mental human rights as set forth in it on the pretext of recognizing them to a lesser extent for domestic reasons. How can the equal protection clause of Art. 26 of the treaty be in conflict with the equal protection clause of the U.S. Constitution for voting rights purposes claimed by petitioners, if this Court established that the voting rights of the American citizens of Puerto Rico are constitutionally protected to the same extent as those of all other U.S. citizens? (*Rodríguez v. PPD* 457 US 1 (1982)). An argument by respondent which deserves special attention by this Court, is the comment at footnote 4, pg. 9, stating that... "**It is not clear** that there is any conflict between the general provisions of Art. 25 of the treaty and the inability of Puerto Ricans to vote for electors for president"... This Court should grant the Petition to clarify the erroneous opinions of the Courts below, the unfounded arguments of respondent, and because under article 3 of the treaty the United States is under the obligation to provide a judicial remedy to petitioners.

III. THE COURT SHOULD GRANT THE PETITION TO RESOLVE UNDER STRICT SCRUTINY TEST WHETHER OVERSEAS VOTING ACT IS UNCONSTITUTIONAL BY EXCLUDING AMERICAN CITIZENS MOVING TO PUERTO RICO FROM VOTING IN PRESIDENTIAL ELECTIONS

Congress recognized a class of voters by enacting the Overseas Voting Act. Citizens moving from one state to another are not discriminated by the Act because they keep their voting right in Presidential elections, while those moving to Puerto Rico lose the voting right unless they move to a foreign country where they continue voting absentee. Respondent proposes that the text of the absentee vote law prevails, because it is the law, even though it is discriminatory.

Petitioners request this Court to apply the strict scrutiny test to the discriminatory voting denial of the Act. Respondent has shown no "compelling state interest" to justify the burdens imposed to those American citizens moving residence to Puerto Rico and losing their right to vote in Presidential elections. There is no less restrictive alternative that a state can implement to the losing of such voting right. Respondent proposal that citizens who move to Puerto Rico can still vote for a Resident Commissioner to Congress is not a "like kind alternative".

The *Katzenback v. Morgan* (384 US 641) case is not applicable to this claim since such case deals with a mere limitation related to elections, and here the issue involves a complete denial of the vote. Nor is respondent's argument acceptable expossing that there will be disuniformity if some citizens can vote absentee from Puerto Rico and not others, because the "equal protection of the laws" clause applies in Puerto Rico (*Rodríguez v. PPD*, 457 US1). Inversely, the discriminatory denial to all American citizens in Puerto Rico cannot be used to justify the discriminatory denial of the absentee vote act to some. The equal protection must be given to all under "like circunstances" in their enjoyment of civil rights (*Truax v. Corrigan*, 257 US 312). Thus, citizens moving to Puerto Rico from states are in "like circunstances" as those moving from states to foreign countries, and should not therefore lose their acquired voting right by reason of moving residence to Puerto Rico. Moreso, all American citizens must be equally protected by Congress. It is class legislation as the one at issue here, discriminating against some and favoring others, that is prohibited by the equal protection guarantee. (*Douglas v. California*, 372 U.S. 353).

Respondent's contradictory positions warrant that this Court grants the Petition. Consider that in January 1995, respondent started judicial action against four States to enforce the National Voting Registration Act. In this case, for purposes of the federal absentee vote denial respondent argued in the Courts below that it is states who primarily regulate elections. In the four cases, respondent argues strongly that it is the federal government who regulates federal elections preempting any state action on this matter, and as follows: ..."The Act attempts to extend the fundamental right of citizens in a democracy -the right to vote to as many Americans as possible...". The only discriminatory exception to this postulate applies to the American citizens residents of Puerto Rico, as evidenced in this action. The Federal District Court held in favor of the position of the Federal Goverment.

(*California v. U.S.*, Case No. 95-20042JW, Northern Dist.). See also: *U.S. v. Penn.*, No. 95-CV-0382 (Eastern Dist.)); *U.S. v. Illi.*, No. 95-C0433 (Northern Dist., Eastern Div.); *Condon v. Reno*, No. 3-951920 (Dist. of South Carolina).

CONCLUSION

For the foregoing reasons, and those exposed in the Brief, the petition for a writ of Certiorari should be granted.

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